

BEFORE THE  
FEDERAL MARITIME COMMISSION

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Docket No 15-11

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cc: OS  
OGC  
A/LJ(2)  
Perb  
**ORIGINAL**

**IGOR OVCHINNIKOV, IRINA RZAEVA, and DENIS NEKIPELOV,**

*Complainants,*

— vs —

**MICHAEL HITRINOV a/k/a  
MICHAEL KHITRINOV,  
EMPIRE UNITED LINES CO., INC., and CARCONT, LTD.**

*Respondents*

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**FILED**

MAY 2-2016

Federal Maritime Commission  
Office of the Secretary

**COMPLAINANTS' BRIEF IN OPPOSITION TO THE RESPONDENTS' URGENT  
REQUEST FOR IMMEDIATE CONFERENCE**

Complainants, through their Counsel, Marcus A. Nussbaum, Esq and Seth M Katz, Esq hereby respond to Respondents' most recent procedurally improper and unorthodox attempt to seek action by the Federal Maritime Commission (the "Commission") While Respondents have styled their most recent filing as an "Urgent Request" it is assumed for all intents and purposes that Respondents are attempting to make a motion for a telephonic conference As such, Complainants submit this brief pursuant to Rules 69 and 71 of the Commission's Rules of Practice and Procedure (46 C F.R. 502 et seq )

As set forth below, the instant motion by Respondents is an attempt to bypass the Commission's Rules of Practice and Procedure, and is an "end around" by Respondents in order to obtain special treatment from the Commission, evidenced by Respondents' admitted failure to make a good-faith effort to confer on the issues Respondents have instead resorted to what has become a continued pattern of ambushing the undersigned with eleventh hour requests for Complainants' consent to the relief requested in the various motions filed by Respondents This

*modus operandi* of gamesmanship on Respondents' part is further demonstrated by Respondents' outlandish request that Complainants' time to respond to this most recent filing "be shortened to 5 p.m." on Thursday, April 28, 2016. While Respondents' counsel purports to have been practicing for twenty three (23) years before the Commission (in recent correspondence on which the Commission was copied), it appears as though counsel either willfully or negligently continues to disregard the Rules of Practice and Procedure of the Commission and the directives of the Presiding Officer. As such, Complainants respectfully request that no conferences be scheduled absent the proper application by Respondents. It is further respectfully requested that the Commission Order that Respondents cease and desist from their continued attempts to seek special treatment from the Commission and that Respondents' be compelled to abide by the Commission's Rules of Practice and Procedure, on pain of sanction.

### **ARGUMENT**

#### **I. THE ISSUES RAISED BY THE RESPONDENTS DO NOT REQUIRE A TELEPHONIC CONFERENCE**

##### **A. Timing of Motion to Dismiss/Show Cause Response Versus Document Production**

On this issue, the Respondents purport that "[w]hen the Presiding Officer ordered production of Shipping Documents on the same due date as Respondents' Motion to Dismiss and Response to Order to Show Cause, he inadvertently created a fundamental unfairness in the proceeding." In support of that argument, Respondents disingenuously claim that "[s]uch Shipping Documents are of course highly relevant to both the Motion and the Response." As a matter of law and per the explicit directives of the Commission, the shipping documents are not relevant to Respondents' forthcoming *Motion to Dismiss* because Respondents' forthcoming motion is *not a Motion for Summary Judgment*.

In the Commission's April 13, 2016 "*Order Granting in Part and Denying in Part Motion for Additional Time in Which to Respond*", the Commission very clearly set forth the following directives

- The time for respondents Empire and Hitrinov to file their answer or answers is extended to May 2, 2016 <sup>1</sup> ***No further extensions will be granted.***
- The answer or answers may be accompanied by motion or motions ***on grounds set forth in Federal Rule of Civil Procedure 12(b)***, but any defenses for which a Rule 12 motion may be filed must be set forth in the answer or answers.
- The time for respondents Empire and Hitrinov to respond to the order to show cause is extended to May 2, 2016

As directed by the Commission, Respondents are to file a motion on the grounds set forth in Fed R. Civ P 12(b), which is *pre-answer* motion to dismiss. As such, there is nothing "fundamentally unfair" about Respondents not having the opportunity to see Complainants' initial disclosure prior to filing their motion. Procedurally, FRCP 12(b) motions are filed prior to the parties engaging in any discovery. Moreover, the issue is now moot as Complainants have fully complied with the Commission's April 27, 2016 Order to File Shipping Documents, and as of the time of this writing, have filed and served their initial disclosure. To the extent that any unfairness exists, it is the Complainants that have been prejudiced as a result of Respondents' professed refusal to comply with the April 27, 2016 Order <sup>2</sup>

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<sup>1</sup> The Commission subsequently *sua sponte* extended Respondents' time to file their Answer to May 4, 2016

<sup>2</sup> When it became apparent that Respondents would have to comply with the April 13, 2016 Order prior to any rulings being made on Respondents' instant application (due to the ALJ's unavailability until Tuesday, May 3, 2016), the Respondents pivoted on the grounds for seeking an extension of the deadline to make initial disclosures, now claiming that such extension should be granted for medical reasons, due to Mr. Hitrinov's alleged illness (as stated in Respondents' motion for an extension of time, which was filed on this date). As will be set forth in detail in Complainant's forthcoming brief in opposition to Respondents' motion for an extension of time, such excuse, however, is unavailing. Respondents had more than ample notice that they would be required to make an initial disclosure in this matter. Moreover, Respondents' motion for an extension of time, of this date, fails to explain what Mr. Hitrinov's purported illness has to do with counsel's ability or inability to compile and file documents with the Commission, which are already in counsel's possession. Respondents' Motion for a Stay of this matter detailed the extended history of litigation between Respondents and Mr. Sergey Kapustin, which makes it clear that Respondents and counsel already have in their possession all documents necessary to file a motion to dismiss, as well as their initial disclosure.

Additionally, these documents have absolutely nothing to do with the preparation of Respondents' response to the Commission's Notice of Default and Order to Show Cause, which should focus on Respondents' failure to timely appear and file an answer in this matter. As such, there is no need for a telephonic conference to discuss these issues.

**B Correction of Facts and Reconsideration of the Commission's Order Denying Respondents' Motion for a Stay**

With regard to these two issues raised in Respondents' brief it appears as though Respondents are seeking to use a telephonic conference to have oral argument on a motion for reconsideration of the Stay Order which the respondents have not filed. The Commission is well aware of the gross impropriety of such a request, and Complainants object to and will not entertain Respondents' attempt to revisit issues that have already been decided in this matter. The vehicle for obtaining that relief is the filing of a motion for reconsideration, and Complainants object to the scheduling of a conference on that issue absent the proper application by Respondents.

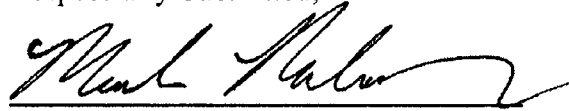
Suffice it to say that this is simply another attempt by Respondents to use procedurally improper means to delay having to come to the table with an excuse as to why they have defaulted, and to further delay the ultimate resolution of this matter.

**CONCLUSION**

In light of the foregoing, it is submitted that the Respondents have not demonstrated a need for a telephonic conference. As such, Complainants respectfully request that Respondents' request be denied. It is further respectfully requested that the Commission Order that Respondents cease and desist from their continued attempts to seek special treatment from the Commission and that Respondents' be compelled to abide by the Commission's Rules of Practice and Procedure, on pain of sanction.

Dated May 2, 2016  
Brooklyn, New York

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "Marcus A. Nussbaum", written in black ink.

Marcus A. Nussbaum, Esq

Seth M Katz, Esq

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Attorney for Complainants

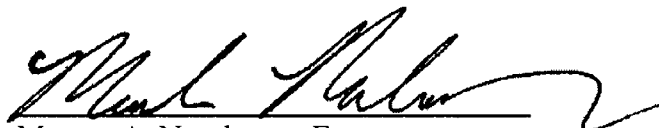
marcus.nussbaum@gmail com

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the **COMPLAINANTS' BRIEF IN OPPOSITION TO THE RESPONDENTS' URGENT REQUEST FOR IMMEDIATE CONFERENCE** upon Respondents' Counsel at the following address

Nixon Peabody LLP  
Attn Eric C Jeffrey, Esq  
799 9th Street NW, Suite 500  
Washington, DC 20001-4501

by first class mail, postage prepaid, and by email (ejeffrey@nixonpeabody.com)

A handwritten signature in black ink, appearing to read "Marcus A. Nussbaum", written over a horizontal line.

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marcus.nussbaum@gmail.com

Dated May 2, 2016 in Brooklyn, New York.

**MARCUS A. NUSSBAUM, ESQ.**

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May 2, 2016 OF THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

Federal Maritime Commission  
800 North Capital Street, N W  
Washington, D C 20573  
Attn Office of the Secretary  
Attn Karen V Gregory

Re *Igor Ovchinnikov, et al, v Michael Hitrinov a/k/a Michael Khitrinov, et al*  
FMC Docket 15-11

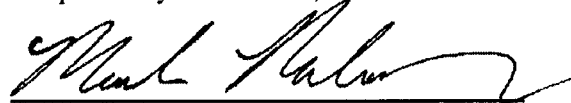
*Kairat Nurgazinov, v Michael Hitrinov a/k/a Michael Khitrinov, et al*  
FMC Informal Docket 1953(I)

Dear Ms. Gregory:

I represent the Complainants in the above referenced matters. Attached please find an original and five copies of Complainants' Briefs in Opposition To the Respondents' Urgent Request for an Immediate Conference

I thank the Commission for its continued courtesy and consideration.

Respectfully Submitted,



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